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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. ~~283~~. 26.

CLARENCE T. BIRKETT,
Plaintiff in Error,

vs.

COLUMBIA BANK,
Defendant in Error.

BRIEF AND AFFIDAVITS IN OPPOSITION TO MOTION FOR SUPERSEDEAS.

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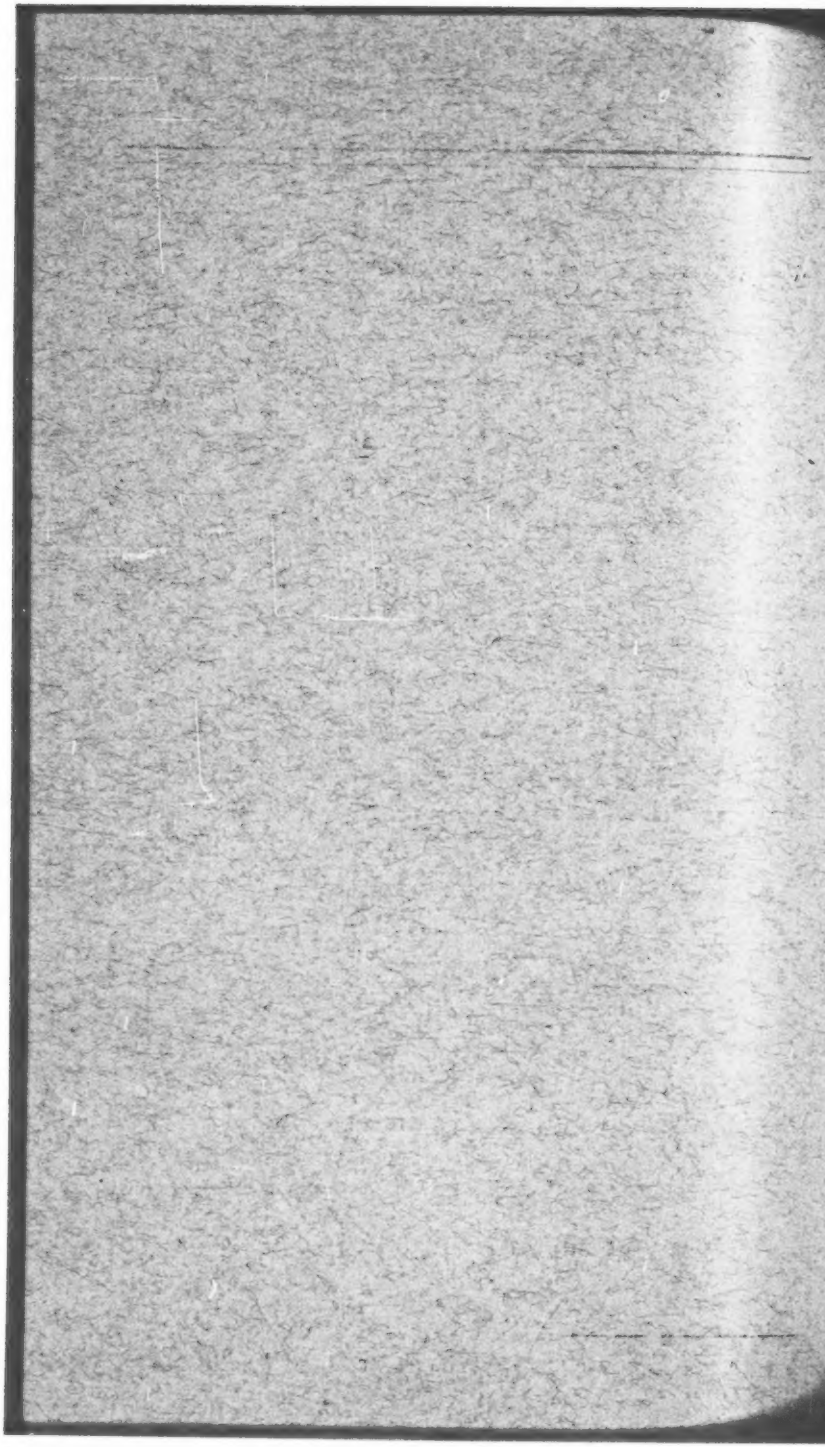

Supreme Court of the United States,

No. 267—October Term, 1903.

CLARENCE T. BIRKETT, Plaintiff in Error,
versus
COLUMBIA BANK, Defendant in Error.

Brief in Opposition to Motion for a Supersedeas.

It appears affirmatively, from the proof submitted in opposition to this motion, that the plaintiff in error failed to lodge with the Clerk of the Court below, in which the record intended to be reviewed remains, a copy of the Writ of Error for the defendant in error within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and that the bond filed by the plaintiff in error was not approved by any judge.

Nor is the contrary alleged in the moving affidavit. There is no allegation of such lodging of a copy of the Writ, and there is no express statement that the bond was approved, although the affiant apparently desires this fact to be inferred from the reference to "the approval thereof by the Chief Judge of the Court of Appeals," which an inspection of the original bond and of the Transcript of the Record fail to disclose.

I.

It is well settled in this court that under such circumstances the plaintiff in error is not entitled to a supersedeas.

U. S. R. S., Section 1000, applies to Writs of Error and requires the Justice or Judge signing the writ to "take good and sufficient security," etc.

U. S. R. S., Section 1007, provides as follows:

> "In any case where a Writ of Error may be a *supersedeas* the defendant may obtain such *supersedeas* by serving the Writ of Error, by lodging a copy thereof for the adverse party in the Clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation."

These provisions, as embodied in the Sections quoted, and in earlier statutes, have frequently been considered by this Court, and *strict compliance* therewith has been uniformly held to be indispensable to the obtaining of the remedy therein provided; and

SUCH COMPLIANCE MUST APPEAR AFFIRMATIVELY FROM THE RECORD.

In *O'Dowd* v. *Russell*, 14 Wall., 402, the Court said, p. 405:

> "It does not appear from the record that any copy of the writ was lodged for the defendants in error in the Clerk's office. It was necessary that such a copy should be filed within sixty days to make the writ of error a *supersedeas*. Nor does it appear when the bond was allowed and filed. It bears date of the 10th of November; the allowance is not dated; nor is its filing noted.
>
> We are of opinion, therefore, that the writ of error cannot operate as a *supersedeas*."

Cited in *Commissioners, &c., v. Gorman*, 19 Wall., 661.

In *United States* v. *Dashiel*, 3 Wall., 688, the Court, per CLIFFORD, J., said, at page 701:

> "Service of a Writ of Error, in the practice of this

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Court is the lodging of a copy of the same in the Clerk's office where the record remains. Whenever a defendant sues out a Writ of Error and he desires that it may operate as a *supersedeas*, he is required to do two things, and if either is omitted, he fails to accomplish his object; 1—he must serve the writ of error as aforesaid, within ten days, and, 2—he must give bond with securities to the satisfaction of the Court," &c.

In *Kitchen* v. *Randolph*, 93 U. S., 86, in deciding a motion to vacate a *supersedeas*, the Court, per WAITE, C. J., reviewing the history of legislation and the authorities on the subject, holds that under the Revised Statutes there is but one way of serving a writ on the defendant in error, namely, by lodging a copy of the same, within the statutory period, with the Clerk of the lower Court, saying at page 91:

"But time is one of the necessary ingredients in the prescribed service to secure a *supersedeas* under the provisions of the first part of the section. It cannot be dispensed with there any more than it could have been under the Act of 1789, and under that Act, as has been seen, it was essential. In fact, it was the one thing upon which more than all others, the relief sought for depended. Service, 'as aforesaid,' must, therefore, mean such a service as would have perfected the stay, if the proper security had been given. Relief is extended only in respect to the security."

And again at page 92:

"We are, therefore, of the opinion that under the law as it now stands, the service of a writ of error * * * within 60 days, Sundays exclusive, after the rendering of the judgment * * * is an indispensable pre-requisite to a *supersedeas* and that it is not within the power of a justice or judge of the Appellate Court to grant a stay of process on the judgment if this has not been done."

Kitchen v. *Randolph*, *supra*, was followed in *Foster* v. *Kansas*, 112 U. S., 201, where this Court refused to punish for contempt an act done in disregard of a *supersedeas*, which had been granted by a Justice of this Court, such act having been committed during the interval ensuing between the granting of the writ and the filing of the same in the office of the Clerk of the Court below.

In *Railroad* v. *Harris*, 7 Wall., 574, the Court held (page 575) that the effect of the Writ of Error as a *supersedeas* "depends on compliance with the conditions imposed by the Act. * * * *We cannot dispense with that compliance in respect to lodging a copy for the adverse party.*" (Italics ours.)

It seems clear from the authorities that even the personal service of the Writ will not suffice as a substitute for this sole and exclusive method of making service prescribed by the Statute, or as compliance therewith.

See also *Moore* v. *Dunlop*, Fed. Cas. 9759, *Ex Parte Ben* *ibid*, 1285.

II.

Nor has this court power to relieve the plaintiff in error from the effects of his failure to comply with the statute after expiration of the prescribed time.

In *Sage* v. *Railroad Co.*, 93 U. S., 412, the Court on granting a motion to vacate a *supersedeas*, said, *per* WAITE C. J., at page 417:

> "A *supersedeas* is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with (citing authorities). This is an essential element in the proceeding and one which neither the Court nor the Judges can disregard. If a delay beyond the limited time occurs the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired and of which he cannot be deprived without due process of law. * * * To make a *nunc pro tunc* order effectual for such purposes it must appear that the delay was the act of the Court and not of the parties, and that injustice will not be done."

See also *Kitchen* v. *Randolph*, *supra*, *cit.*

III.

The bond was not approved by the judge granting the writ.

In *O'Reilly* v. *Edrington*, 96 U. S., 724, on motion to dismiss an appeal where the bond had been approved by the clerk of the court below, instead of by the judge, this court held the objection to the regularity of the appeal on this ground, under R. S. Section 1000, to be well taken, for the reason that the power and duty of approving the bond could not be delegated by the judge to the clerk. Inasmuch, however, as the appeal had been otherwise regularly taken, this court exercised its discretion and gave the appellant an opportunity to supply this defect by filing a properly approved bond.

The same rule was applied in

National Bank v. *Omaha*, *ibid*, 737.

It follows, *a fortiori*, that approval of the bond is, under R. S. Section 1000, an indispensable element, in the absence of which the writ cannot act as a *supersedeas*.

See also

United States v. *Dashiel*, *supra*.

Nor is there any room for the inference that the bond was approved, as in *Davidson* v. *Lanier*, 4 Wall, 454, and other similar cases where particular facts warranted such inference to be drawn. Here the bond was executed before a County Judge, many hours travel from Albany, where the writ was allowed, and there is nothing to indicate that the judge who allowed the writ had any knowledge of the sufficiency of the sureties, or that the bond was necessarily before him at the time. It may be fairly assumed that in the latter event plaintiff would not have neglected to ask for a formal approval in accordance with the usual New York practice.

IV.

The bond and the sureties are insufficient.

The bond does not bind the heirs, executors, and administrators of the obligors. The term "successor" is applied more particularly and properly to corporations and not to individuals.

Bouvier's Law Dictionary.
Alger v. Fay, 12 Pick., 322.

In view of the affidavit of the cashier of the defendant in error (submitted to show that the attitude of defendant in error is taken for substantial and not merely technical reasons) the sureties cannot be said to have established their sufficiency merely by the *ex parte* affidavits drawn in the usual general terms, which are appended to the bond.

It is true that, for obvious reasons, the sources of affiant's information are not disclosed. But the burden of showing sufficiency is on the plaintiff in error, especially where there has been no approval of the bond, and where serious doubt is cast on the value of the proffered security.

The rule laid down by DRUMMOND, D. J., in *Hobson* v. *Johnson*, 4 Biss., 505 (s. c., 12 Fed. Cas. 267, No. 6553), that the affidavit of the surety, without appearance before the Judge taking the bond, should not be accepted as sufficient without further evidence of sufficiency, except in the absence of objection to the surety, should be applied.

It may be doubted whether the bond, having been executed *before issuance of the writ*, is effectual for any purpose.

In *Telegraph Co.* v. *Eyser*, 19 Wall, 419, the Court say with reference to the writ of error: "Its issuance must, of course, precede the execution of the bond."

The supersedeas should, therefore, be denied.

Washington, 23rd February, 1904.

JULIUS J. FRANK,
Attorney for Defendant in Error.

Affidavits.

Supreme Court of the United States.

No. 267—October Term, 1903.

CLARENCE T. BIRKETT, Plaintiff in error,
versus
COLUMBIA BANK, Defendant in error.

STATE OF NEW YORK,
County of New York, } *ss.:*

Walter S. Griffith, being duly sworn, deposes and says: That he is the cashier of the above-named defendant in error and has been such since the commencement of the action wherein the judgment under review herein was entered.

That in October, 1903, deponent caused an investigation and inquiry to be made, both through commercial agencies in the City of New York and through local bankers in the neighborhood of the place of residence of the sureties named in and who executed the bond referred to in the moving papers herein, as to the sufficiency of such sureties; that the facts resulting from such investigations showed that Laura R. Birkett, one of said sureties, who is the wife of the above-named plaintiff in error, seemed to be irresponsible and that Clarence H. Ferenbaugh, the other of such sureties, was not a man of large means and, owing to large indebtedness for borrowed money, was not entitled to credit beyond moderate amounts, and that it was problematical whether, in case of ultimate recovery by the defendant in error herein, the amount of the judgment appealed from could be collected from such surety.

That upon communication of these facts by the defendant in error to its attorney and counsel herein, Mr. Julius J. Frank, said attorney, as appears from the correspondence which deponent has read, informed the attorney for the plaintiff in error of such facts and requested him to submit, by way of justification of the sureties or otherwise, facts showing the responsibility and sufficiency of such sureties, in default whereof the defendant in error would issue execution to collect the judgment under review; that although at first attorney for the plaintiff in error expressed his willingness so to do, he finally refused to comply with the request of the attorney for the defendant in error. That it appears from such correspond-

ence that the attorney for the defendant in error suggested to the attorney for the plaintiff in error that the latter might himself take the depositions of such sureties and submit the same to him.

That defendant in error would not have issued execution herein had it not been convinced of the insufficiency of the sureties on said bond, and that its attorney in said correspondence with the attorney for the plaintiff in error waived compliance with all technicalities and forms of procedure and requested merely to be satisfied of the sufficiency of said sureties, or, in case of their insufficiency, the substitution of a sufficient bond or undertaking for the one filed herein.

That on March 31st, 1903, the above-named defendant in error, by its president, was served with a paper, appearing to be a copy of a bond or undertaking executed by the sureties referred to in the moving papers and by the above-named plaintiff in error; that said paper did not bear any endorsement, or any other entry or statement of any kind, indicating that it had been approved by any court or judge, or that it was a copy of an undertaking or bond given or filed in the office of the clerk of any court in the above entitled action.

WALTER S. GRIFFITH,
Cashier.

Sworn to before me this 13th day of February, 1904.

GEORGE STOLL,
Notary Public,
Westchester Co.

[SEAL.]

Certificate filed in New York Co.

Supreme Court of the United States.

No. 267—October Term, 1903.

CLARENCE T. BIRKETT, Plaintiff in Error,
versus
COLUMBIA BANK, Defendant in Error,

STATE OF NEW YORK,
County of New York, } *ss.:*

John E. Donnelly, being duly sworn, deposes and says: That he is an attorney at law, duly admitted to practice in the Courts of the State of New York and during the year 1903 was managing clerk in the office of Julius J. Frank, the attorney for the defendant in error herein.

That during the first week of October, 1903, deponent made diligent search among the records and papers on file in the office of the Clerk of the County of New York and made diligent inquiry of the clerks in that office in charge of Writs of Error from this Court to the Justices of the Supreme Court of the State of New York and of other papers usually filed therewith, for a copy of the Writ of Error in the above entitled action. That deponent failed to find any copy of such Writ in said office or any record or entry of any record of such copy having been lodged or filed therein at any time from and after the 18th day of March, 1903.

That deponent was then informed by the Record Clerk and Deputy County Clerk that no such copy had been lodged in said office during said period. That deponent requested said Deputy County Clerk to furnish him with a certificate to the effect that no such copy Writ had been filed or lodged in said office during said period, but said clerk, while admitting this to be the fact, declined to make such certificate for the reason that it was contrary to the practice of the office of said county clerk to make certificates of the absence of papers from the files or custody of said office.

JOHN E. DONNELLY.

Sworn to before me this 17th day of February, 1904.

JACOB SCHLAMP,
Notary Public,
New York County.

Supreme Court of the United States,

No. 267—October Term, 1903.

CLARENCE T. BIRKETT, Plaintiff in Error,
versus
COLUMBIA BANK, Defendant in Error.

STATE OF NEW YORK,
County of New York, } *ss.:*

Joel Del Monte, being duly sworn, deposes and says: That he is a clerk in the office of Julius J. Frank, the attorney for the defendant in error herein.

That on the 15th day of February, 1904, deponent made diligent search among the records and papers on file in the office of the clerk of the County of New York and made diligent inquiry of the clerks in that office in charge of writs of errorfrom this court to the justices of the Supreme Court of the State of New York, and of other papers usually filed therewith, for a copy of the writ of error in the above entitled action.

That deponent failed to find any copy of such writ in said office or any record or entry of any record of such copy having been lodged or filed therein at any time from and after the 18th day of March, 1903.

That deponent is informed by the clerks in charge of said records that no such copy had been lodged in said office during said period. That deponent requested the Deputy County Clerk to furnish him with a certificate to the effect that no such copy writ had been filed or lodged in said office during said period, but said Clerk, while admitting this to be the fact, declined to make such certificate for the reason that it was contrary to the practice of the office of said County Clerk to make certificates of the absence of papers from the files or custody of said office.

Deponent further says that he found on file in said office a bond for the prosecution of the Writ of Error in the above entitled action, dated and filed April 22, 1903, and that the same bears no endorsement or other entry of approval by any Judge or Court, and that the record in said office of the filing of said bond bears no such entry or endorsement.

JOEL DEL MONTE.

Sworn to before me this 17th day of February, 1904.

MILTON MAYER,
Notary Public, N. Y. Co.

Supreme Court of the United States,

No. 267—October Term, 1903.

CLARENCE T. BIRKETT, Plaintiff in Error,
versus
COLUMBIA BANK, Defendant in Error.

STATE OF NEW YORK, County of New York, } ss.:

Edwin C. Hamburg, being duly sworn, deposes and says: That he is an attorney at law, duly admitted to practice in the Courts of the State of New York; that he was, at the times hereinafter specified, a clerk in the office of Julius J. Frank, the attorney for the defendant in error herein.

That on the 19th day of October, 1903, deponent made diligent search among the records and papers on file in the office of the Clerk of the County of New York and made diligent inquiry of the Clerks in that office in charge of writs of error from this Court to the Justices of the Supreme Court of the State of New York and of other papers usually filed therewith, for a copy of the writ of error in the above entitled action. That deponent failed to find any copy of such writ in said office or any record or entry of any record of such copy having been lodged or filed therein at any time from and after the 18th day of March, 1903.

That deponent was then informed by the Record Clerk and Deputy County Clerk that no such copy had been lodged in said office during said period.

EDWIN C. HAMBURG.

Sworn to before me this 17th day of February, 1904.

M. A. HESSEL,
Com. of Deeds, No. 60,
City of New York.